

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN MAUZY PITTMAN, CHIEF JUDGE
DIVISION II

CACR05-1216

May 3, 2006

DAVID A. COSGROVE
APPELLANT

APPEAL FROM THE SEBASTIAN
COUNTY CIRCUIT COURT
[NOS. CR2002-553, CR2002-555, CR2002-1137]

V.

HON. J. MICHAEL FITZHUGH,
JUDGE

STATE OF ARKANSAS

APPELLEE

AFFIRMED

Appellant pled guilty to forgery, theft of property, and fraudulent use of a credit card in June 2002. Imposition of any sentence to imprisonment was suspended for five years, and appellant was ordered to pay a \$500 fine and \$869.73 in restitution, with the restitution payments of \$50 per month to be made beginning July 1, 2002, and continuing until paid in full. Seven months later, in January 2003, appellant faced additional charges of felony breaking or entering, to which he also pled guilty, resulting in a sentence of two years' imprisonment to be followed by four years' suspended imposition of sentence, a \$1,500 fine, and an order to pay additional restitution in the amount of \$411.80 at the rate of \$50 per month. Petitions to revoke were filed in February 2005, alleging that appellant violated the

conditions of his suspensions by failing to pay restitution, fines, and costs as ordered. After a hearing, the trial court found that appellant willfully failed to make the required payments, revoked his suspensions, and imposed sentence. On appeal, appellant argues that the trial court's finding is not supported by the evidence. We affirm.

To revoke a suspended sentence, the burden is on the State to prove the violation of a condition of the suspended sentence by a preponderance of the evidence. *Jones v. State*, 355 Ark. 630, 144 S.W.3d 254 (2004). On appellate review, the trial court's findings will be upheld unless they are clearly against the preponderance of the evidence. *Id.* Furthermore, because the determination of a preponderance of the evidence turns on questions of credibility and weight to be given to the testimony, we defer to the trial judge's superior position. *Id.*

The record shows that appellant paid less than \$100 in the three years since he was ordered to pay fines and restitution, and he still owed \$779.73 in restitution and \$90 in fees. He offered no reasonable explanation for this failure, testifying that he had held "quite a few" jobs but kept them for an average of only one week. Appellant also stated that he had been in jail or prison five or six times in the past three years for theft and breaking or entering, and that this contributed to his failure to pay the fines and restitution. We think that appellant, by his own testimony, has demonstrated that he has the ability to obtain work, and it likewise appears that he was able to make regular payments to his father during the time period in question. After reviewing the record, we hold that the trial court's finding that appellant

inexcusably failed to make the required payments on time is not clearly against the preponderance of the evidence.

Affirmed.

ROBBINS and BAKER, JJ., agree.